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Supreme Court of the United States

October Term, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

IN THE MATTER OF

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

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JURISDICTIONAL STATEMENT

Appellant, Local 144, Hotel & Allied Service Employees Union, S. E. I. U.* AFL-CIO, pursuant to United States Supreme Court Rules 13(2) and (15), files this its state-

* During the course of the litigation, the name of the Appellant was changed from Building Service Employees International Union to Service Employees International Union.

ment to show that the United States Supreme Court has jurisdiction of these direct appeals to review the final orders of the Court of Appeals of the State of New York entered on October 14, 1968 in the Office of the Clerk of the Court of Appeals and that substantial federal questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 23 N. Y. 2d 20, 294 N. Y. S. 2d 297. The opinion of the Supreme Court, New York County, in *Long Island College Hospital etc.* v. *Catherwood, etc.,* (New York County Clerk's Index No. 13058/1965) is not reported. The Appellate Divisions' decision is reported in 28 App. Div. 2d 1092, 283 N. Y. S. 2d 1014. No opinion was rendered.

The opinions of the Appellate Division of the State of New York, First Department, and the Supreme Court of the State of New York, New York County, respectively, in the *Matter of Long Island College Hospital etc.* v. *Catherwood,* (New York County Clerk's Index No. 12953/1967) are reported in 29 App. Div. 2nd 642, 287 N. Y. S. 2d 313, and 54 Misc. 2d 712, 283 N. Y. S. 2d 249. Copies of all of the foregoing opinions and the final orders appealed from are set forth in Appendix A hereto.

Jurisdiction

Appellee commenced an action in *Long Island College Hospital* v. *Catherwood* (New York County, Index No. 13058/65) seeking, in part, a judgment declaring that Section 716 of the New York State Labor Relations Act (Labor Law, §716) had no application to the dispute between it and appellant, and that the Industrial Commissioner had no authority to appoint a Fact-Finding Commission to inquire into the dispute.

Appellee sought, in part, the alternative relief of a judgment declaring that Labor Law, §716 violated the Constitution of the United States or that the New York State Labor Relations Act (Labor Law, §700 et seq.) as amended in 1963, and as applied to appellee, violated the constitution.

Appellee also commenced a special proceeding, *In the Matter of Long Island College Hospital etc.* v. *Catherwood* (New York County Index No. 12953/67), pursuant to Articles 78 and 75 of the New York Civil Practice Law and Rules to enjoin the Industrial Commissioner and the New York State Mediation Board from taking any steps designed to require compulsory arbitration of the dispute between Appellee and Appellant on the grounds, among others, that Labor Law §716 violated the Constitution of the United States.

Separate appeals in the foregoing two cases were taken by Appellee. Nevertheless, the cases were consolidated for the purpose of argument by the Court of Appeals of the State of New York, and the Court of Appeals rendered one decision and opinion. The final orders of the Court of Appeals appealed from herein were entered on October 14, 1968. While sustaining Appellee's position that Labor Law, §716 was not applicable to the dispute, the Court of Appeals upheld the constitutionality of section 716 by failing to rule expressly on the constitutional arguments proffered by Appellee. Appellant Local 144, and the State officials, moved for reargument or for an amendment of the remittitur on the grounds that Labor Law §§713 and 716, as construed by the Court of Appeals, violated rights guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. That motion was summarily denied, the Court making no reference to the constitutional questions, and refusing to amend its remittitur so as to reflect its consideration of the constitutional questions created by its construction of the statutory sections.

The order denying Appellant's motion was made and entered in the Office of the Clerk of the Court of Appeals on November 20, 1968 (23 N. Y. 2d 741). The motion for leave to reargue, and the order denying the motion are part of the record filed herewith. Notices of appeal in both cases were filed in the Office of the County Clerk and Clerk of the Supreme Court, New York County on February 3, 1969.

The Supreme Court of the United States has jurisdiction to review by appeal the final orders complained of by virtue of the provisions of 28 U. S. C. Section 1257(2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the final orders in this by appeal: *Largent* v. *Texas,* 318 U. S. 418; *Lawrence* v. *State Tax Commission,* 286 U. S. 276; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673; *Great Northern R. Co.* v. *Sunburst Oil Co.,* 287 U. S. 358; *Missouri ex rel Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313; *Bakery and Pastry Drivers (Local 802)* v. *Wohl,* 315 U. S. 769; *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468; *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538.

Statutes Involved

New York State Labor Relations Act (Labor Law, §§713 and 716) are set forth in Appendix B hereto.

Questions Presented

(1) May a state constitutionally prohibit employees of voluntary hospitals from striking, picketing or effectively publicizing their disputes with their employers, and require them instead to submit to fact-finding or compulsory arbitration; may a state impose such requirement even though the fact-finding or arbitration may be deferred for a period of years from the onset of the dispute?

The question, specifically stated, is: Where the State of New York has by statute prohibited workers in voluntary hospitals from striking, picketing, or effectively publicizing their differences with their employers, and substituted fact-finding and compulsory arbitration, are those substitutes to strikes, picketing and publicity reasonable alternatives under the First and Fourteenth Amendments of the United States Constitution?

(2) Under the circumstances of Question (1), may a state impose upon a labor organization the requirement that its certification as representative of a majority of employees in an appropriate bargaining unit be subjected to compulsory judicial review, which procedure may require several years, before the labor organization is deemed to have an enforceable right to act as such representative in invoking fact-finding or arbitration as substitutes for strike or other concerted activity?

(a) May a state accomplish this purpose, if permissible, by requiring a labor organization to charge an employer with the commission of unfair labor practices, giving rise to the employer's right to challenge the union's certification?

(b) May a state make such requirement applicable only to unions representing workers in voluntary hospitals?

Statement of the Case

In 1963, New York State enacted changes in the Labor Relations Act so as to extend its coverage to employees in voluntary hospitals (State Labor Relations Act, as amended, L. 1963, ch. 515, Appendix B, A 37-40, *infra*).

For the first time, employees in voluntary (non-profit-making) hospitals were permitted to invoke the procedures of the State Labor Relations Board, and unions of workers

in voluntary hospitals could become certified as bargaining representatives of such employees (Labor Law, §705).

At the same time, two other amendments were enacted: section 713 makes it unlawful for employees of voluntary hospitals to strike or picket and limited the giving of publicity to their disputes with their employers; section 716 (a new section)provides that all collective bargaining agreements between employees of voluntary hospitals and their employers shall be deemed to provide for arbitration of grievances, and that in the absence of a collective bargaining agreement, the Industrial Commissioner of the State of New York is empowered to appoint a fact-finding commission or to submit the dispute to compulsory arbitration. Section 716 was the first statutory requirement of compulsory arbitration in labor disputes enacted in New York.

Appellant Union (hereinafter referred to as "Union") was certified by the New York State Labor Relations Board in December, 1964 as collective bargaining representative of the maintenance department employees of the Appellee Long Island College Hospital (hereinafter referred to as "Hospital"). The Union sought to negotiate a collective bargaining agreement; the Hospital refused to negotiate with it, contending that it would not accept the Union as representative until its certification had been subjected to review in court, and approved by judicial authority. The Hospital also contended, *inter alia,* that section 716, in its provision for compulsory arbitration, violated the fourteenth amendment of the Constitution of the United States. Efforts of the New York State Mediation Board to effect an amicable resolution failed, and the Board certified its failure to settle the dispute. The Industrial Commissioner appointed a Fact-Finding Commission to inquire into the dispute. The Hospital challenged the jurisdiction of the Commission, claiming it had no dispute with its employees

within the meaning of section 716. The Hospital commenced the first captioned action for an injunction restraining the Industrial Commissioner and the Fact-Finding Commission from holding hearings or taking any other action.

The Hospital's assertions were the same as those made during the entire course of this matter; that it had no dispute with its employees as to which the Industrial Commissioner could act; that the only issue was the status of the Union as the representative of its employees, and, as to that issue, it was entitled to be charged by the Union with committing an unfair labor practice so that it could obtain a judicial review of the Union's certification. The Union and the State officials, joined as defendants, contended that no employer had a right to such judicial review of the certification of its employees' representative. New York law, as in the federal law, provides no direct judicial review of a union's certification. The only procedure for review is of a final order in an unfair labor practice proceeding.

The Supreme Court, New York County, in a decision unanimously affirmed by the Appellate Division, First Department, refused to grant the injunction. The Court adopted the Fact-Finding Commission's determination that it could not question the Union's certification, and further held that such certification is reviewable only if there is a final order in an unfair labor practice proceeding (Labor Law, §707). On cross-motions for summary judgment, the Supreme Court, in March 1967, found on the merits that the refusal of the Hospital to negotiate with the Union, for any reason, was a dispute within the meaning of section 716, and dismissed the complaint. The Appellate Division unanimously affirmed, without opinion (28 A. D. 2d 1092, 283 N. Y. S. 2d 1014) (1st Dep't, 1967).

During the course of the litigation, the Fact-Finding Commission held hearings, heard testimony, and issued a Report and Recommendations. The Commission had rejected the Hospital's assertion that no section 716 dispute existed by stating that section 716 was the statute's substitute for strike, and pointed to the fact that when a certified union strikes to compel an employer to deal with it, the decision to strike rather than file unfair labor practice charges precludes judicial review. It stated that a contrary result would leave collective bargaining in the hospitals vulnerable to intolerable delay. The Hospital refused to accept the Recommendations, and the Union advised the Industrial Commissioner that the dispute was still unresolved. On July 6, 1967 the Industrial Commissioner ordered compulsory arbitration, again pursuant to section 716. The Industrial Commissioner appointed the New York State Board of Mediation to serve, by three designated members of the Board, as arbitrator. The Hospital commenced the second above captioned proceeding to stay the arbitration.

The Supreme Court, in a decision affirmed by the Appellate Division, First Department, refused a stay of the arbitration ordered by the Industrial Commissioner. The decision of the Supreme Court was not reported.

Appeals from the orders dismissing the complaint in the Fact-Finding case, and denying a stay of arbitration, were consolidated by the Court of Appeals which rendered one decision. The Court of Appeals, in a 4-3 decision,* reversed the orders of the courts below, and declared that the Hospital's application for (1) a declaration that the Industrial Commissioner had no authority to appoint the

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* Upon original argument of the Appeals, Judge Keating did not participate. The Court divided 3-3, whereupon, the Court, on its own motion, directed reargument which resulted in the decision and order appealed from.

Fact-Finding Commission, and (2) an order staying the arbitration ordered by the Industrial Commissioner until the Union's certification had been judicially reviewed and found valid and enforceable, should be granted.

The majority opinion declared that a condition precedent to a union's resorting to section 716, that is, to the remedies of fact-finding or compulsory arbitration, is the affirmation of its majority status by filing refusal-to-bargain charges against the employer, permitting judicial review of its certification. The majority acknowledged that such procedures could cause substantial delay.

How the Federal Question Was Presented

This is a case of first impression. The statute in question, Labor Law, §§713 and 716, had never before been subjected to examination by the Court of Appeals. In both proceedings—that directed against the Fact-Finding Commission and that seeking to stay the arbitration ordered by the Industrial Commissioner—the Hospital contended that the statute violated the fourteenth amendment of the Constitution of the United States, arguing in part that a finding that its refusal to bargain was a dispute within the meaning of the Act would deprive the Hospital of its right to judicial review (R. Vol. I, pp. 94-96; R. Vol. II, p. 29).* The Hospital also argued that the provisions for arbitration established no standards, and violated the Constitution in that respect. The lower courts did not discuss these constitutional questions. The Court of Appeals discussed the constitutional arguments only in passing, stating in a footnote that a "serious question of due process might arise" if there were no provision for judicial review of the certification (A. p. 14, ftn. 3).

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* The Record includes the Record in the Court of Appeals in the "fact-finding case", index no. 13058/65 which is referred to here as R. Vol. I, and the Record in the "Arbitration case", index no. 12953/67 which is referred to here as R. Vol. II.

The dissenting opinion argued that the constitutional rights of hospital employees included the right to bargain collectively, which, in a different setting, included the essential concomitants of strike and picketing. It stated that a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition on strikes in nonprofit hospitals.

The precise federal questions sought to be reviewed on this appeal were not posed until after the decision of the Court of Appeals had been rendered. In creating a condition precedent to the availability of section 716 remedies, the Court of Appeals so altered the statute as to render it violative of the due process, equal protection, and free speech guarantees of the Constitution.

The decision of the Court of Appeals was wholly unexpected. All of the decisions of the courts below had been unanimous to the contrary. Nor was there anything in the statutory language or its legislative history permitting the Court's construction to be anticipated.

In fact, there is no statute, either federal or state, which parallels the requirement created by the Court: that of compulsory judicial review of a union's certification. The creation of such a condition is contrary to all decided law of New York State and of the federal courts. *Leedom v. Kyne,* 358 U. S. 184; *Wallachs* v. *Boland,* 277 N. Y. 345 (1938). Thus, the particular questions could not have been asserted prior to the decision of the Court of Appeals. A motion for reargument, or to amend the remittitur, was made to the Court (a copy is made part of the record). It stated that the court-created condition (1) deprived voluntary hospital workers of equal protection of the laws, (2) constituted an impermissible prohibition on First Amendment rights in indefinitely suspending rights to

picket or publicize grievances, and (3) violated the due process clause in imposing unreasonable restraints on the rights of hospital workers to select a representative for the purpose of collective bargaining, and upon the unions representing the workers.

The Court of Appeals summarily denied the motion for reargument, without opinion.

The Questions Presented Are Substantial

This case is of general importance. It represents a state's experiment with legislation designed to prevent interruption of services deemed essential to the public, whether such services are rendered by government employees or employees of non-governmental institutions. The need to balance government's legitimate interest in preventing such interruptions with the rights of the workers in their relationship with their employers is clear; what is unclear is the extent to which the rights of workers in such circumstances may be subordinated, delayed or obliterated.

The rights of workers to strike, picket or otherwise engage in concerted activity are generally held to be constitutionally protected rights. *Bailey* v. *Alabama*, 219 U. S. 219, 245; *American Federation of Labor* v. *American Sash and Door Co.*, 335 U. S. 538; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293.

Those rights may be infringed only in very specific and narrow circumstances. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers Union*, 312 U. S. 287. If, for the purpose of this argument is it assumed that the State has the right to restrict workers in voluntary hospitals from the exercise

of these rights, under what conditions may the State prohibitions be enforced?

The test which seems to be developing is that of whether in prohibiting such activity a reasonable alternative is provided. Compulsory arbitration has been used as an alternative in disputes affecting public carriers subject to the Railway Labor Act, and prohibitions against strikes under that Act have been sustained by this Court since the compulsory arbitration provided was deemed "a reasonable alternative". *Railway Trainmen* v. *Chicago River and Indiana Railroad,* 353 U. S. 30, 41.

The section of the New York law here in issue is not entirely unique; Minnesota has had for many years statutory prohibition of strike by voluntary hospital employees providing for compulsory arbitration of their labor disputes. The Minnesota statute was upheld as constitutional by the highest court of that state which found that availability of adequate substitutes was a constitutional prerequisite to prohibiting strikes; *Fairview Hospital Assn.* v. *Public Building & Hospital Employees Union,* 241 Minn. 523, 64 N W 2d 16 (1954).

In the case at bar, assuming that prohibition against strike or picketing by this classification of workers is valid, the alternatives provided by the statute, as it has been construed by the Court of Appeals, are neither reasonable alternatives nor adequate substitutes.

1. Section 713 of the New York Labor Law as construed by the Court below constitutes an interference with rights guaranteed by the First Amendment.

Prior to July 1, 1963, section 713 of the Labor Law guaranteed non-interference with the rights of employees then covered by the law to strike or engage in other concerted activities. At the time that section 716 was enacted, section

713 was amended so as to make it unlawful for non-profit-making hospital employees to strike or to picket. That section, however, provides that hospital employees may truthfully advise the public that a grievance or dispute as defined in section 716 exisits at the hospital.

Prior to the enactment of sections 713 and 716, the law was clear that peaceful picketing was protected against State action by the Fourteenth Amendment. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Bakery and Pastry Drivers* v. *Wohl,* 315 U. S. 769; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293. No exception was made from the constitutional guarantee for picketing of charitable institutions, including hospitals. *Prospect Heights Hospital, Inc.* v. *Davis,* 26 Misc. 2d 762, 201 N. Y. S. 2d 890 (1960); *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, 59 N. Y. S. 2d 91, affd. 272 App. Div. 998, 73 N. Y. S. 2d 835 (1947); *Beth El Hospital* v. *Robbins,* 185 Misc. 506, 60 N. Y. S. 2d 798 (1946); *American Society for the Prevention of Cruelty to Animals* v. *Geiger,* 208 Misc. 29, 141 N. Y. S. 2d 610 (1955). However, the suspension of the right to picket, as with the right to strike, was at least arguably balanced by the Legislature's provision of a presumably immediately available alternative opportunity for expression of grievances. But cf. *Bakery & Pastry Drivers* v. *Wohl, supra.* There the New York State courts granted an injunction on the theory that a labor dispute did not exist within the meaning of the state anti-injunction law. This Court reversed, holding that the state could not abridge the right of free speech on its conception of what constituted a labor dispute within the state law.

The limitation on picketing by hospital workers was a departure from all prior law. The potential vice of the limitations in section 713 were anticipated by the members of

the Fact Finding Commission, Professor Michael Sovern, Hon. Orrin G. Judd (now U. S. District Judge for the Eastern District of New York), and Hon. Joseph Murphy. In their Interim Report, the Commission expressed concern for the conflict between the provisions of the new statute and the constitutional guarantees. The Commission said:

> "If a hospital's refusal to negotiate with a certified union does not give rise to a 'dispute' within the meaning of section 716, a serious problem arises under section 713's saving clause, which allows 'publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital . . .' The employer's view here, read in the light of section 713, would seem to mean that an employer's refusal to negotiate with a certified union may not be publicized. The constitutional difficulty posed by such an interpretation is obvious" (R. Vol. I, p. 58).

The Commission's concern has been realized in the Court's construction of section 716. A literal interpretation of the Court's decision would isolate hospital employees into a group required to stand mute for as long as it would take to follow the procedures which the Court has said are essential before they or their certified representative may speak on their behalf. Such a construction violates every tenet of the First and Fourteenth Amendments.

The statute, as it is now construed, not only discriminates against this class of workers so as to withhold from them the most basic rights of speech, assembly and peaceful protest, it also creates a *cordon sanitaire* around the voluntary hospital employer. Such an intent has uniformly been condemned, most recently in *Amalgamated Food Employees'*

Union (Local 590) v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 where this Court said (at p. 325): "Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." See also *United States* v. *Robel*, 389 U. S. 258, 266-268.

2. The Statute, in imposing the requirement of compulsory judicial review only upon unions representing voluntary hospital workers, violates rights guaranteed by the First and Fourteenth Amendments.

The lower Court's concern with due process requirements appears to have been unfortunately one-sided. The decision reflects concern only with the possibilty of a due process problem in the absence of judical review of the Union's certification. That concern was contrary to settled law: due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh &c. Railway Co.* v. *Backus*, 154 U. S. 421, 426-427; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *Dohany* v. *Rogers*, 281 U. S. 362, 369.

Due process does, however, require that legislation be reasonably calculated to obtain the desired objective. *Liggett Co.* v. *Baldridge*, 278 U. S. 105, discussed in 42 Harv. L. Rev. 435.

The avowed purpose of the statute here involved, to avoid labor unrest in voluntary hospitals, cannot even conjecturally be related to the requirement that only judicially certified unions be permitted to act as representatives of voluntary hospital workers.

The test of the reasonableness of the relationship between the evil to be curbed and the method adopted to achieve that purpose has been variously phrased. The clear consensus, however, is that where First Amendment rights are affected, only the most narrowly drawn limitations will be sustained.

Shelton v. *Tucker,* 364 U. S. 479; *United States* v. *Brown,* 381 U. S. 437, 461. It is now axiomatic that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms. *NAACP* v. *Button,* 371 U. S. 415, 438.

An instructive discussion of the constitutional requirements is found in *Thomas* v. *Collins,* 323 U. S. 516. In that case it was held that while a state, under its police power, might regulate labor unions with a view to protecting public interest, the exercise of such power is subject to the limitation that it does not violate rights guaranteed by the Constitution.

As this Court said (at page 531):

> "Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. *Schneider* v. *State,* 308 U. S. 147, 161. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this."

See also *West Virginia School District* v. *Barnette,* 319 U. S. 624; *DeJonge* v. *Oregon,* 299 U. S. 353, 365; *Cantwell* v. *Connecticut,* 310 U. S. 296. The *DeJonge* case enunciated the important principle that in regulating constitutional rights, a State may only regulate the abuse, not the right itself. It was held there that "(t)he rights [of free speech and press] may be abused . . . [and] the peo-

ple through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed'' (at pp. 364, 365).

3. Sections 713 and 716, as construed by the Court below, deprive workers in voluntary hospitals in New York of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The Legislature, in enacting section 713, made unlawful strike and picketing by a specific group of workers—those employed by non-profitmaking hospitals. It did not attempt to place the same restraints upon hospital workers employed by profitmaking hospitals or upon other workers employed in providing essential services, although there is no reason to suppose that strikes or picketing by such workers is of less concern or hazard to the public. In isolating a segment of the hospital workers in the State, as the Legislature created the statutory scheme, the question of equal protection of the laws did not arise. It did not for the simple reason that the Legislature balanced the deprivation imposed upon that group by granting alternate remedies under section 716 which were presumably immediately available.

The constitutional infirmity appeared, however, as a consequence of the Court's further isolation of the same group of employees by establishing a condition to their exercise of rights as workers which is not imposed upon other employees in the State, or, in fact, in the United States. The Court-created condition, both by itself, and in its indefinite suspension of the alternate remedies provided by section 716, has changed the statute into an unconstitutional invasion of rights guaranteed by the Fourteenth Amendment.

As a result of the decision of the Court, for the first time anywhere, a group of workers has had imposed upon them

the condition that they obtain court approval of their representative before they may, in concert, exercise their rights as workers (to organize, strike or picket, or to avail themselves of the alternatives to those measures). Since the non-profit hospital workers have been singled out for such invidious treatment, the question thus arises: Does the equal protection clause permit an official act which imposes *only* on workers in non-profit hospitals restrictions upon the right of self-organization more stringent than those applied to any other group of workers?

The answer to that question requires the acceptance of the essential fact: No law regulating labor relations, either federal or state, whether in private or public employment, requires that a union "representative" receive court sanction of its status as representative. The Court's determination that hospital workers in non-profit hospitals in New York State must receive such approval of their selection of representative is unique. That the Court's determination is contrary to all statutory and decisional law on the subject is not the issue here. The issue is whether by imposing such a restriction on the rights of this group of workers the Court has violated the fundamental principle of equality of application of the law.

It is recognized that "(t)he Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way." *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268. The classic formulization of the test is that the differentiation or singling out of a group, "must rest on a difference which is real, as distinguished from one which is seemingly specious, or fanciful, so that all actually similarly situated will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible function of the state and that the difference must bear a re-

lation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible." Brandeis, J. in *Quaker City Cab. Co.* v. *Pennsylvania,* 277 U. S. 389, 406, where he dissented on the merits.

The lack of reasonableness of the classification here is apparent not only from the lack of relationship to the declared purpose of the statute but also from the following:

(1) No other employees, and specifically workers in private hospitals in New York, have applied to them the rule of the Court in this case; hospital workers in government hospitals do not.*

Other employees whose services are deemed essential, and who are therefore prohibited from strike, do not have to submit to compulsory review of their union's certification. See e.g. Railway Labor Act, 45 U. S. C. §151, *et seq.;* and statutes providing for arbitration in public utilities.

(2) The Court's own estimate of a possible time lapse resulting from court review of certification was a conservative 2½ years (A. 18).

(3) Nowhere in our system of law is there any comparable procedure known; requiring one who asserts a right to charge another with the commission of wrongdoing (here, filing of unfair labor practice charges) in order to vindicate his constitutional rights.

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* Private hospital employees have been held subject to the State Labor Relations Act, and are not restrained from strikes nor required to obtain judicial approval of their union representatives. Recently, employees of private hospitals meeting certain monetary jurisdictional standards have come within the ambit of the National Labor Relations Act, which does not require either restraint on strike or compulsory judicial review of certifications. *Butte Medical Properties,* 168 NLRB No. 52 (1967). The Taylor Act which regulates labor relations in government hospitals in New York has no provision for judicial review of the certification of representatives of government employees, although the employer is compelled to bargain with their representative. Civil Service Law, §200 et seq. and particularly §§207, 208.

It is the Court which has created the burden without parallel anywhere in the labor law. Its decision must, therefore, meet the standards uniformly used to test legislation which applies only to a limited classification of persons. Certainly there is no question that a constitutional prohibition cannot be transgressed indirectly any more than it can be violated by direct enactment. What is controlling is not the words or form of a statute but its actual practical operation and effect. *Speiser* v. *Randall*, 357 U. S. 513, 526.

Conclusion

The statutory sections here involved represent an experiment with the prompt submission of disputes to collective bargaining and compulsory arbitration as a *quid pro quo* for legislative prohibtion of strikes by workers who provide services which are deemed essential to the public health and safety. The need to find a constitutional balance between the public interest and the rights of such workers is a paramount issue, not only in New York, but throughout the United States. Thus, the questions presented by this appeal are substantial and of urgent public importance.

Respectfully submitted,

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Of Counsel.

APPENDICES

Appendix A, Opinions and Final Judgments Appealed From

Order No. 575 of Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur October 14, 1968.

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1. No. 575. 67

THE LONG ISLAND COLLEGE HOSPITAL,
Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,
Respondents.

BE IT REMEMBERED, That on the 24th day of November in the year of our Lord one thousand nine hundred and

sixty-seven, The Long Island College Hospital, the appellant- in this cause, came here unto the Court of Appeals, by Kelley, Drye, Newhall, Maginnes & Warren, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And M. P. Catherwood, as Industrial Commissioner of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frederick T. Shea, of counsel for the appellant, and by Judith P. Vladeck, of counsel for the respondent Local 144, and by Mr. Mortimer Sattler, of counsel for the respondents State Officials and Commission, briefs filed by amici curiae, and reargued by counsel as above except Maria L. Marcus, of counsel for the respondents State Officials and Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, October 14, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

(Emblem)

Appendix A

Order No. 102 of Court of Appeals

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of October in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

Witness,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur October 14, 1968.

1. No. 102. 58

In the Matter of
THE LONG ISLAND COLLEGE HOSPITAL,
Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,
Respondents.

BE IT REMEMBERED, That on the 9th day of March in the year of our Lord one thousand nine hundred and sixty-eight, The Long Island College Hospital, the appellant in this cause, came here unto the Court of Appeals, by

Kelley, Drye, Newhall, Maginnes & Warren, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And M. P. Catherwood, as Industrial Commissioner of the State of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Frederick T. Shea, of counsel for the appellant, and by Judith P. Vladeck, of counsel for the respondent Local 144, and by Mr. Mortimer Sattler, of counsel for the respondents State Officials and Commission, briefs filed by amici curiae, and reargued by counsel as above except Maria L. Marcus, of counsel for the respondents State Officials and Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, without costs, &c., as aforesaid.

Appendix A

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, October 14, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(Emblem)

Appendix A

Opinion of Court of Appeals *

STATE OF NEW YORK

COURT OF APPEALS

1. No. 575 575

THE LONG ISLAND COLLEGE HOSPITAL,

Appellant,

vs.

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors. &c.,

Respondents.

1. No. 102 68

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL,

Appellant,

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York, & ors., &c.,

Respondents.

In each case:

Order reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein. Opinion by Fuld, Ch. J., in which

* Opinion unrevised and uncorrected. Not for publication.

Scileppi, Jasen and Gibson, JJ., concur. Burke, J., dissents and votes to affirm in an opinion in which Bergan and Breitel, JJ., concur.

FULD, Ch. J.:

The basic question presented in these cases—one of first impression—is this: Where a nonprofitmaking hospital challenges the representation status of a union, does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation? The Appellate Division held that the Industrial Commissioner had such power. We disagree; the orders appealed from must be reversed.

A proper understanding of the matters in issue calls for a brief review of the legislative history of section 716 and cognate sections of the Labor Law.

Prior to July 1963, state and local governments were greatly concerned with repeated strikes, picket lines and violence in nonprofitmaking hospitals, which interrupted essential services by hospital employees, and which resulted in the issuance of a number of injunctions against strikes. (See *Jewish Hospital of Brooklyn* v. *"John Doe,"* 252 App. Div. 581; *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, affd. 272 App. Div. 998; *Beth-El Hospital* v. *Robbins,* 186 Misc. 506; *Mount Sinai Hospital, Inc.* v. *Davis,* 17 Misc 2d 727.)

The Legislature, in considering the enactment of a remedial statute, was confronted with the provisions of

the New York State Labor Relations Act which deprived unions, not recognized by a nonprofitmaking hospital, of the right to be certified as the exclusive representative of the employees it represented. Further, the Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against such strikes, it would have been unjust to deprive hospital employees of their most potent economic weapon without granting them adequate means of securing relief against substandard wages and working conditions.

In an attempt to resolve these problems, the Legislature, in 1963, amended the Labor Law. There were three vital amendments.

First, strikes by employees of nonprofitmaking hospitals or residential care centers and lockouts by the employer were made unlawful (Labor Law, §713).

Second, the provisions of the State Labor Relations Act were extended to those institutions (Labor Law, §715). By enabling unions of hospital employees to invoke the procedures of the State Labor Relations Board, such unions, without striking, could become certified as the exclusive representatives of such employees (Labor Law, §705). A union of hospital employees could thus petition the Board for certification as exclusive representative of an appropriate unit of hospital employees. If the hospital refused to recognize a duly certified union, the union could obtain from the Board and, if necessary, from the court an order directing the hospital to bargain with the union (Labor Law, §§704[6], 705, 706, 707[1]). Under well established principles, the only way in which an employer, whether industrial or a hospital, could obtain court

review of the validity of a Board certification was by refusing to bargain with the union and then challenging the Board's subsequent order stamping such refusal an unfair labor practice. (See *Wallach's, Inc.* v. *Boland,* 277 N. Y. 345.)

Third, under section 716 (a new section), mediation, fact-finding and binding arbitration were established for the resolution of "disputes" between a nonprofitmaking hospital or residential care center and a union. The Industrial Commissioner or the New York State Board of Mediation was empowered to submit "disputes" as defined by that section to a fact-finding commission and, if the findings were rejected, to binding arbitration. Section 716, far from encompassing all disputes, covered only those which were limited to economic and union security issues; this is the way in which section 716(1) reads:

> "As used in this section 'grievance' means any controversy or claim arising out of or relating to the interpretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section 'dispute' means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions."

Thus, under the 1963 amendments the Labor Board's traditional jurisdiction to determine representation ques-

tions—subject to court review under section 707—was for the first time extended in favor of nonprofitmaking hospitals and residential care centers, and all other disputes (primarily economic issues) were to be determined through mediation, fact-finding and compulsory arbitration. The new amendments consequently meshed into the existing system controversies between voluntary hospitals and unions, leaving representation issues to the Labor Board subject to court review under section 707, and economic issues to mediation, fact-finding and compulsory arbitration.

With this legislative background, we turn now to the events and proceedings in these cases. The Labor Board certified Local 144 as the bargaining representative of maintenance employees. The hospital thereafter refused to bargain collectively with it on the ground that it did not represent the employees as it claimed. The union chose not to follow the traditional procedure by filing an unfair labor practice charge under section 704(6) against the hospital for refusal "to bargain collectively with representatives of the employees"—a procedure which, as I have already pointed out, would have enabled the hospital judicially to challenge the finding of an unfair labor practice as well as the Labor Board's certification of the union as exclusive bargaining representative for maintenance employees. (See *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345, *supra; NLRB* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 439.) Instead, it invoked the provisions of section 716(4) for the resolution of the controversy. The Industrial Commissioner appointed a three-man fact-finding commission and, when its recommendations were rejected by the hospital, the Commissioner sent the controversy to compulsory arbitration before the New York State

Board of Mediation. The hospital brought the present actions in which it is essentially seeking to enjoin the fact-finding commission from functioning and to stay the compulsory arbitration proceeding.

As already indicated, we are called upon to decide whether an issue as to representation is a "dispute" under section 716(1). If it is not, then, the Industrial Commissioner lacked the authority to appoint the fact-finding commission and to send the issue to compulsory arbitration. The legislative history, the language of the amendments and underlying policy considerations lead us to conclude that representation issues are not embraced in the word "dispute" as defined by that section.

The manifest reason for the exclusion of representation issues from that definition was that the same legislative body, which provided, in section 716, that economic issues were to be resolved by mediation, fact-finding and binding arbitration, also amended section 715 so that representation issues would be, in the case of nonprofitmaking hospitals—as they had been in the case of industrial and commercial establishments determined by the Labor Board (§705). Since representation disputes were to be resolved by the Labor Board, there was no reason for the Legislature to create a second set of procedures and a second tribunal to resolve the same issue, especially since questions as to representation, including any issue as to the appropriate bargaining unit, particularly call for the expert judgment of the Labor Board. As we wrote in *Matter of Levinsohn Corp.* (299 N. Y. 454), in speaking of the powers of the National Labor Relations Board—which applies with equal force to the State Labor Board—to deal with representation issues (p. 466),

> "The Federal courts have uniformly recognized that because of the complexity and difficulty of the problem of designating the *appropriate unit*, the power to make the decision has been delegated exclusively to the expert judgment of the law board which has wide discretion in making the determination."

The words, "concerning the association or representation of persons," are contained in the definition of "labor dispute" as set forth in section 701(8), a section which has been in effect for many years prior to 1963 and which, although inapplicable to the present cases, does furnish the background for viewing the definition of "dispute" in section 716(1). If the design of the legislature was to make section 716 applicable to representation issues, it would have been a simple matter to have included those words in the definition of section 716(1), as they are in section 701(8).[1]

That those words were intentionally omitted from section 716(1) is also apparent from the fact that the Legislature rejected the Savarese bill—the forerunner to section 716—which called for mediation and compulsory arbitration of "labor disputes" between nonprofitmaking hospitals and representatives of their employees but defined "labor disputes" as including controversies "con-

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[1] Section 701(8) in relevant part provides:

> "The term 'labor dispute' includes, but is not restricted to, any controversy between employers and employees or their representatives as defined in this section concerning the terms, tenure or conditions of employment or *concerning the association or representation* of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment." (Emphasis supplied.)

cerning the association or representation of persons." (Joint Committee Report, Legislative Document [1963] No. 38, pp. 76-78.)

The traditional method of obtaining a court review of a Board certification by challenging the Board's unfair labor practice order (see, *supra,* p. 3), still applies to industrial and commercial enterprises (Labor Law, §707), and there is nothing in reason, or in the language of sections 715 [2] and 716 which even remotely suggests that nonprofitmaking hospitals to which section 707 now applies do not have the same right of judicial review [3] of a Board certification that employers generally possess under that section (§707) or that a different procedure of judicial review was intended to apply to nonprofitmaking hospitals. A decision that the validity of the Board's certification

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[2] In 1963, this section (§715) extended the provisions of article 20 of the Labor Law to nonprofitmaking hospitals. One of the sections of that article thus made applicable to these hospitals was section 707 which gives aggrieved persons the right of judicial review of final Board orders and, pursuant to such provision, employers generally, as previously noted (*supra,* p. 3), may obtain a court review of a Board certification by challenging the Board's unfair labor practice order.

[3] It is today an established principle of jurisprudence that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (*Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140; see 4 Davis, Administrative Law Treatise, §28.07, pp. 30-32.) Since, in the present case, certifications are (as we have already shown) subject to judicial review under section 707 by challenging the Board's unfair labor practice order, the presumption of reviewability of the certification clearly applies. In point of fact, in the absence of some procedure for the review of a final agency action, a serious question of due process might arise, for, as was recently observed, "there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (*Gardner* v. *Toilet Goods Assn.,* 387 U. S. 167, 177, *per* Fortas, J., concurring.)

cannot be tested in the court until time-consuming mediation, fact-finding and compulsory arbitration proceedings have been exhausted can only serve to delay the rendition of a prompt determination as to the representation issue, a delay which is not in the interest of the public, the voluntary hospitals or the unions, since unresolved representation issues may cause the very strife which the 1963 amendments were enacted to prevent.

There have been occasions when the Legislature has granted two administrative agencies concurrent jurisdiction to determine the same issue, but the wisdom of such a grant of power is highly questionable, involving as it may duplicative proceedings and delays in decision making. We should not, therfore, be astute to find the existence of concurrent jurisdiction unless no other reading of the statute is possible. Here, as we have shown, there is nothing in the statutory scheme to support a claim of concurrent jurisdiction; on the contrary, there is no overlapping between the jurisdiction of the Labor Board and the Industrial Commissioner, the Labor Board being given exclusive jurisdiction with respect to questions of representation and the Industrial Commissioner and State Mediation Board being granted powers confined to economic matters. Indeed, section 702(9) specifically provides, "Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board".

Concededly, section 716 may not be invoked by a group of employees or by a minority union to arbitrate disputes with a non profit making hospital. If the statute were to be so read, it would be possible, for instance, for five hospital employees—out of a total of 100 or more—to obtain medi-

ation, fact-finding and arbitration under section 716, even though those five speak for none but themselves; and this process could be repeated so long as any other minority group made similar collective bargaining demands upon the hospital.

Such a reading of the statute, which would augument the rights of minority groups, would go counter to the modern-day labor policy which, as we recently observed in *Phelan* v. *Theatrical Protective Union No. 1* (22 N. Y. 2d 34, 43 [concurring opinion]), "has been built on the premise that a majority labor organization is the most effective vehicle for obtaining improvements in wages, hours and working conditions. 'The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.' *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U. S. 175, 180)".

We may not overlook the very significant fact that, if section 716 may be invoked by a minority union before there has been a determination as to the appropriate bargaining unit, then, the arbitration board in order to make a meaningful award respecting the collective bargaining demands of a minority group or union, would have to determine the appropriate unit to which wages, hours, union security, seniority and other economic matters should be made applicable. An award based upon such a union determination would raise serious questions of due process since it would be rendered in a bilateral arbitration proceeding without having given other essential and necessary parties (other employees and other unions) having a vital interest in the award an opportunity to be heard. What is more, the unit determination in a section 716

arbitration proceeding would be made not by the Labor Board, which we have repeatedly come to recognize has special competence to deal with union problems (*Matter of Levinsohn Corp.*, 299 N. Y. 454, *supra*), but by an *ad hoc* arbitration panel not necessarily possessing the expertise to pass on frequently complicated and perplexing unit questions.

Furthermore, since collective bargaining includes the handling of grievances and arbitration proceedings, it would be—as the courts have held—an unfair labor practice for the employer to arbitrate with a minority union since the very process of arbitrating with a minority union is a violation of the majority union's rights. (See, e. g., *McGuire* v. *Humble Oil and Refining*, 355 F. 2d 352, cert. den. 384 U. S. 988.) An interpretation of the statute which would thus destroy the exclusive bargaining rights of a majority union, and which would mean that the Legislature in 1963 simultaneously enacted two provisions, one of which, section 715 (see, also, section 706), made it an unfair labor practice for a nonprofitmaking hospital to arbitrate with a minority union, and the other, section 716, would require the hospital by virtue of the compulsion of the statute to arbitrate with a minority union and thus commit an unfair labor practice, defies common sense.

To avoid the chaos which would result from such an interpretation of section 716, and to give majority unions the complete bundle of exclusive rights which they acquired by the statutory changes made in 1963, section 715 must be read as granting exclusive collective bargaining rights to a majority union—including the exclusive right to participate in arbitration proceedings under section 716—and section 716 as meaning that it may be invoked only by a union representing a majority of the employees in an appropriate bargaining unit. In short, a condition pre-

cedent to a union's resorting to the provision of section 716 is the establishment by it of its exclusive representation status under sections 705 and 707.[4]

Most regrettable and unfortunate is the delay that the union claims has prevented the parties from commencing negotiations and from agreeing to the terms of a collective bargaining agreement. However, to be faulted in this case is not the Labor Act but the union which did not follow judicially accepted methods for testing the validity of a Board certification by filing a refusal—to—bargain charge under section 706. Had the union observed the traditional method of testing a Board certification, the long delay[5] involved in resolving the current issue as to whether section 716 can be invoked in the case where the employing hospital challenges the representation status of the union would not have occurred.[6]

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[4] In this connection, it should be noted that the Appellate Division, on one of the early appeals in these very cases (*Long Island College Hospital* v. *Catherwood*, 26 A D 2d 543) also reached the conclusion that the term "dispute" in section 716(1) does not include a representation issue, declaring that

> "The disputes provision of section 716 of the Labor Law is not sufficiently broad to include a dispute over the right to exclusive representation by a union, the propriety of a bargaining unit, or any other issues raised as to the correctness of certification of an exclusive bargaining agent."

[5] Three years and ten months have elapsed since the union was certified by the Board.

[6] Unfortunately, delays are likely to occur whenever parties resort to the courts for a final adjudication of their disputes. Thus, in *Labor Board* v. *Metropolitan Ins. Co.* (380 U. S. 438), where the question as to the validity of a Board certification was reviewed by the courts as part of a challenge to a Board's order sustaining a refusal to bargain charge, the time which elapsed from the date of the Board certification to the date of the Supreme Court's determination as to the validity of the certification was 2½ years. (See, also, *Metropolitan Life Ins. Co.*, 156 N.L.R.B. 1408.)

Appendix A

For the reasons stated, the orders appealed from should be reversed and the appellant's application (1) for a declaration that the Industrial Commissioner had no authority to make his order of June 30, 1965, appointing the fact-finding commission, and (2) for an order permanently staying the arbitration ordered by the Industrial Commissioner until the respondent union's certification has been judicially reviewed and found valid and enforceable, should be granted.

BURKE, J. (Dissenting):

The New York State Labor Relations Act was enacted in 1937, in recognition of "the economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association . . ." (Labor Law, §700) Indeed, our Court quickly recognized the Act as a legislative enactment intended to provide a procedure for the disposal of labor controversies which, when adopted and availed of by the parties to controversies, should terminate disputes. (See *Florsheim Shoe Store Co.* v. *Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287*, 288 N. Y. 188, 198; *United Baking Co.* v. *Bakery & Confectionery Workers' Union*, 257 App. Div. 501, 504). The Act created the State Labor Relations Board (§702), gave recognition to the rights of employees (§703), and then noted specific instances wherein the conduct of the employer would constitute an "unfair labor practice". (§704) A subdivision of that section made it an "unfair labor practice" for an employer to refuse to bargain collectively with the certified representatives of his employees. (§704(6)). While most of the subsequent sections of the Act merely pertain to the various procedural aspects for its implemen-

tation, section 713, as originally enacted, provided that nothing in the Act "shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities . . ."

As the majority opinion quite properly indicates, there were numerous strikes at nonprofitmaking hospitals in New York City during the summer of 1962. Public reaction to the disruptive effect of these strikes on the orderly conduct of hospitals' business forced Governor Rockefeller to intercede in these strikes and to agree to the creation of specific legislation to deal wtih nonprofitmaking hospitals, thereby putting an end to such strikes. In July, 1963, section 716 of the Labor Law was engrafted on the pre-existing Labor Relations Act to bring nonprofitmaking hospitals located in cities with a population in excess of one million people within its scope. In furtherance of this legislative act, two existing sections (Labor Law, §§713, 715) patently conflicting with section 716, were amended to eliminate apparent inconsistencies. (See Reilly, New York Nonprofit Hospitals and the Labor Relations Act: Pitfalls of Emergency Legislation, 17 Syr. L. Rev. 482).

In enacting this legislation, a particular effort had to be made to preserve the Constitutional rights of the hospital employees. Our State Constitution clearly and unequivocally guarantees the right of employees "to organize and to bargain collectively through representatives of their own choosing." (N. Y. Const. art. 1, §17) Moreover, the Supreme Court has often stated in a different setting, that the right to picket and to strike is an essential concomitant of the right to engage in collective bargaining. (See *Bus Employees* v. *Missouri*, 374 U. S. 74; *Bus Employees* v. *Wisconsin Board*, 370 U. S. 383.)

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Section 716 was thus intended to serve a dual purpose; it was to guarantee the continued care of patients in non-profitmaking hospitals, and, at the same time, to preserve the Constitutional right of employees to bargain collectively through duly elected representatives. To protect hospital patients, employees were forbidden to strike. To safeguard the employees' rights, section 716 created a prompt means for employee representatives to have review of all their "disputes" and "grievances." The statutory definitions of these terms, set forth in the majority opinion, are indeed broad in scope.

It is not necessary to reproduce the full text of section 716 at this time. Rather, it is sufficient to note that Local 144 was employing these provisions prior to the commencement of the present action. After receiving the support of the maintenance employees in an election, and following its certification by the State Labor Relations Board as the proper bargaining representative for these maintenance employees of Long Island College Hospital, Local 144 requested that hospital to bargain collectively with it. When this request was refused, the union invoked the provisions of subdivision 4 of section 716. The Industrial Commissioner appointed a three-man fact-finding commission, and when its recommendations were also rejected by Long Island College Hospital, the Industrial Commissioner sent the controversy to compulsory arbitration before the New York State Board of Mediation. The hospital brought the present actions, seeking in essence to enjoin the fact-finding commission from functioning in accordance with the legislative plan by requesting a stay in the compulsory arbitration proceeding.

The majority opinion is quite clear in expressing its understanding of the issue involved in this litigation.

They state: "The basic question presented in these cases . . . is this: *Where a non profitmaking hospital challenges the representation status of a union,* does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute, and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation?" (p. 1) (Emphasis added) Since we conclude that the hospital has no right under section 716 to challenge the representative status of a certified union, we do not deem it necessary to view the case in that context.

It is well settled that this Court, when interpreting a statute, is obliged to read the language of the statute closely and to draw plain inferences from that statute's legislative history. Both the terms of section 716 and its legislative history clearly indicate that the legislature did not intend to permit the hospital to contest a certified union's representative status.

In enacting section 716, the Legislature considered and then rejected a bill which would have given the hospital the right to contest a union's representation. The Savarese bill—a forerunner to section 716—had provided for mediation and compulsory arbitration of "labor disputes" between nonprofitmaking hospitals and representatives of their employees. Under that proposal, the term "disputes" was given a much broader interpretation than that found in the final enactment, as it included controversies "concerning the association or representation of persons." (Joint Committee Report, Legislative Document [1963] No. 38, pp. 76-78) Had that provision been

adopted, the representation issue would thus have come at least before the arbiter and, had the Legislature so chosen, ultimately before the Supreme Court where all aspects of his decision could have been made reviewable.

The detailed provisions of the New York State Labor Relations Act pertaining to representation and elections, were first established in 1937. Without belaboring the point, it is sufficient to note that they are at least as comprehensive as those set forth in the Railway Labor Act, initially enacted in 1926. (44 Stat. 557, as amended, 45 U. S. C. §§151-188) The major objective of that Act, according to the United States Supreme Court, was "the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." (*Virginian R. Co.* v. *System Federation No. 40,* 300 U. S. 515, 547) Section 152, Ninth of that Act sets forth a machinery for the selection of the representatives of employees. That section authorizes the National Mediation Board, upon request, to investigate disputes over representation; to "designate" those who are affected; to use a secret ballot or any other appropriate means of ascertaining the choice of the employees; to establish rules governing elections and to certify the representatives so chosen as the bargaining representatives of these employees in negotiations. In sum, there is an election, the results are examined and barring irregularities, the results are certified. It is noteworthy that our federal courts have consistently sustained the certification of the National Mediation Board under that Act and have held that such certification need not be subject to judicial review. (See, e.g., *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees* v. *Association for the Benefit of Non-Contract Employees,* 380 U. S. 360;

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Switchmen's Union v. *National Mediation Board*, 320 U. S. 297; *United States* v. *Feaster*, 376 F. 2d 147; *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248) It is our contention that the Legislature, in enacting section 716 concluded that, in the interest of preserving the employees' Constitutional right to bargain collectively, the determination of a representative unit in nonprofitmaking hospitals should lie solely with the State Labor Relations Board. The propriety of such a decision cannot be challenged in the light of the Supreme Court decisions,[1] and in view of the Legislature's own choice to avoid review by rejecting the Savarese bill.

The majority's assumption that an employer must, at some point, be permitted to challenge the unit certified by the Board before being compelled to submit to compulsory arbitration under section 716, is predicated on the scheme of the 1937 Act. Under section 704(6) of the original Act, it was an unfair labor practice for an employer to refuse to bargain collectively with the proper representatives of its employees. The statutory sequence permitted the representative to bring an unfair labor practice charge against the employer before the labor relations board. (§706) During the pendency of that action, the employees were permitted to engage in strikes and "any

[1] The majority opinion expresses concern that a serious due process question exists in the absence of judicial review. Justice Fortas, in the same paragraph in *Gardner* v. *Toilet Goods Ass'n* (387 U. S. 167, 177) which they quote, is quick to concede that the Legislature is the proper body to determine the form in which the remedy of review shall be exercised. Indeed, he cites with approval the decision of that Court in the *Switchmen's Union* case, which held that the certification by the National Mediation Board of a representative bargaining unit under the Railway Labor Act was sufficient, and that such certification need not be the subject of judicial review. The Supreme Court has thus clearly indicated that there is no due process problem in this present situation.

other lawful, concerted activity." (§706(5)) If the board sustained the charge the employer could then obtain judicial review of the charge and at the same time, bring before the court the propriety of the certification. (§707) The employees could continue their "lawful activities" during this entire process. Significantly, the original Act did not provide for compulsory arbitration, had no provision specifically pertaining to nonprofitmaking hospitals, and declared that nothing in the entire article "shall be construed so as to interfere with, impede or diminsh in any way the right of employees to strike or engage in other lawful, concerted activities . . ." (§713) Finally, not even the original Act would compel a union to commence an unfair labor practice action. Nevertheless the majority has apparently seen fit to compel Local 144 to file an unfair labor practice charge as a condition precedent to compulsory arbitration under section 716. They state that "a condition precedent to a union's resorting to the provision of section 716 is the establishment by it of its exclusive representation status under sections 705 and 707." (pp. 9-10). Had this been the intent of the Legislature when enacting section 716, twenty-six years after the effective date of the Act, it is reasonable to assume that they would have made some reference to it. We merely note that no such reference was made.

Section 706, dealing with the prevention of unfair labor practices has permitted employees since 1937 to engage in strikes and other lawful, concerted activity while the unfair labor practice charge is investigated, and if it is sustained, while it is being reviewed by the Supreme Court. Thus, the employer has an avenue of review, and the employee is armed with effective weapons for penalizing dilatory tactics. This was in accord with the general policy of the entire act: "It is in the public interest that equality

of bargaining power be established and maintained." (§700) We emphasize that section 713 was amended in 1963 to prohibit employees of nonprofitmaking hospitals from employing those rights generally regarded as the concomitants of collective bargaining—specifically, strikes and lockouts. There is no longer an equality of bargaining power in an unfair labor practice charge for these employees. Moreover, since the employees are precluded from striking, an employer is less concerned with the results of any election since he knows that he must negotiate with someone. As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition of strikes in nonprofit hospitals. Such an analysis, we submit, preserves the equality of bargaining power, considered essential to the entire Act.

The majority opinion twice intimates that its decision is necessary to prevent minority unions from invoking section 716 before there has been a determination as to an appropriate bargaining unit. (pp. 8, 9) The fact is that Local 144 has already been certified as the majority union for the maintenance employees at Long Island College Hospital, confirming the election returns. Thus, when the majority contends that it is an unfair labor practice for an employer to arbitrate with a minority union, they fail to note that Local 144's certification has established it as a majority union. *McGuire* v. *Humble Oil & Refining Co.* (355 F. 2d 352), relied upon by the majority, is totally inapplicable to the present situation. In that case, the court merely concluded that it would be an unfair labor practice for the employer to negotiate with a minority union *when another union had already been certified* as the proper representative unit. Accordingly, the Hobson's choice envisioned by the majority (p. 9) is illusory.

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Following the enactment of section 716, lawsuits have been filed involving Long Island College Hospital, Park Avenue Clinic Hospital in Rochester, St. Joseph's Hospital in Syracuse, Crouse-Irving Hospital in Syracuse (Reilly, New York Nonprofit Hospitals and the Labor Relations Act: The Pitfalls of Emergency Legislation, 17 Syr. L. Rev. 482, 483 n. 8) and Roosevelt Hospital in New York City. It is too early to ascertain what effect the decision reached by the Court in this case will have on these, and analogous cases. However, we note that in *Davis* v. *Roosevelt Hospital,* (N. Y. L. J., Sept. 30, 1968, p. 16, col. 1, 2) the parties have already concluded compulsory arbitration. However, since Roosevelt Hospital preserved its challenge against the union's certification, it is reasonable to presume that the results of that arbitration will be again delayed, pending this unnecessary review of the union's certification. As we said above, the representation issue should be finally resolved when the board issues a certification. As a result of the 1963 amendment to section 713, the employees in nonprofitmaking hospitals are at all times precluded from striking, thus reducing if not eliminating any interest an employer might have with reference to the particular union membership of his employees. Under such circumstances, and in light of the history of section 716, we conclude that an employer has no right to question the certification of a particular union.

We would affirm the orders of the Appellate Division.

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Opinion of Supreme Court, New York County

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Supreme Court, New York County
Mr. Justice Flynn

L. I. College Hospital v. Catherwood—Motion is disposed of in accordance with decision in accompanying memorandum opinion on companion motion in this action, published simultaneously herewith.

L. I. College Hospital v. Catherwood—The plaintiff's motion for summary judgment on the first cause of action and defendants' cross-motion for summary judgment are considered and are disposed of as follows:

It appears from the papers submitted on this motion that there is no dispute that the plaintiff operates a non-profit hospital, and after it had objected to the results of an election conducted by the defendant New York State Labor Relations Board said defendant certified that the defendant Local 144 be the bargaining representative for plaintiff's maintenance employees. The plaintiff refused to recognize the defendant Local 144 as the said bargaining representative and refused to negotiate with that union. The defendant Local 144 did not seek relief pursuant to section 705 of the Labor Law and alleges that a controversy exists concerning the representation of the maintenance workers. Instead, the said defendant union demanded relief pursuant to section 716 of the Labor Law, which provided for fact-finding by a board of inquiry and the submission of disputes to arbitration. The board of inquiry has convened and issued an interim report. No arbitration has been had herein.

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The plaintiff contends that by reason of the defendant's failure to seek a determination as to the validity of its certification as the bargaining representative, the plaintiff is denied judicial review of the certification and is compelled to arbitrate without being certain that Local 144 is the proper bargaining representative for its employees.

Under ordinary circumstances arbitration can only be had by the express agreement of the parties. In this case, section 716 of the Labor Law provides that where there is no agreement between a non-profit hospital and its employees, the agreement to arbitrate is implied, by law, and that the Supreme Court shall have jurisdiction thereof pursuant to the provisions of article 84 of the Civil Practice Act (now article 75, CPLR). It appears that if Local 144 is not the bargaining representative of the maintenance workers then no agreement to arbitrate can be implied pursuant to section 716 of the Labor Law; and this issue may be tested by procedures set forth in section 7503 and section 7511, CPLR.

In view of the fact that no arbitration proceedings has been instituted, the court will not pass upon the terms of certification at this time.

The maintenance of the buildings where the ill, disabled and infirm are housed and treated affects the health of the people of the State of New York (N. Y. Constitution, article 17, sec. 2), and the Legislature exercised a valid power in the enactment of section 716 of the Labor Law (Park Ave. Hospital v. Kramer, 48 Misc. 2d 826, modified on other grounds 26 A. D. 2d 612).

The refusal of the plaintiff to negotiate with the defendant Local 144, for whatever reason, is a dispute within the meaning of section 716(1) of the Labor Law, and the main-

tenance employees were entitled to the relief provided in that section.

The plaintiff contends that its connection with the operation of a medical school exempts it from the provisions of the statute. The providing of unimpaired medical facilities in non-profit hospitals without interruptions caused by strikes over wages, working hours, job security and other labor disputes were the concern of the Legislature in the enactment of section 716 of the Labor Law and the fact that the plaintiff has some relationship with a medical school can not render it immune from the provisions of that section. It would further appear that in order to maintain the standard of care required in the City of New York and attract internes and other personnel to work at the hospital the plaintiff must be affiliated with a medical school (see Loew v. City of N. Y., 43 Misc. 2d 1021, aff'd 22 A. D. 2d 762).

The plaintiff alleges that it is subject to the National Labor Relations Act. However, as a non-profit hospital, it is specifically excluded from that act (29 U. S. C., sec. 152[2]). In order to interpose this defense, under section 715 of the Labor Law, it first must be claimed by the defendant labor board that the maintenance employees are subject to the National Labor Relations Act and the plaintiff must "concede to" and "agree with" the defendant labor board as to federal jurisdiction. Here the defendant labor board does not assert that the employees are subject to the federal law, and the plaintiff cannot assert a claim that it is not subject to article 20 of the Labor Law.

Accordingly, the plaintiff's motion for summary judgment is denied and defendants' motion is granted to the extent of dismissing the complaint without prejudice to any rights plaintiff may have pursuant to article 75, CPLR. Settle judgment.

Appendix A

Opinion of the Appellate Division

Botein, P.J., Stevens, Eager, Capozzoli and McGivern, JJ.
12558N

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner-Appellant,
E. T. D'Ablemont

against

M. P. CATHERWOOD, as Industrial Commissioner of the State of New York; VINCENT D. McDONNELL, THOMAS E. FITZGERALD, EDWARD A. O'HARA, ROBERT F. RISLEY, FRANCIS E. RIVERS, ERIC J. SCHMERTZ and JOSEPH SHISTER, as the Members of the NEW YORK STATE BOARD OF MEDIATION; PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; and JAY KRAMER, JAMES AMADEI and MARTIN GREENE, as the Members of the NEW YORK STATE LABOR RELATIONS BOARD,

Respondents-Respondents.
M. L. Marcus
J. P. Vladeck

Order and judgment herein appealed from, unanimously modified, on the law, to strike the second decretal paragraph thereof, and as so modified such order and judgment is otherwise affirmed, without costs or disbursements to either party.

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In this proceeding, brought pursuant to CPLR Articles 75 and 78, petitioner contests the validity of the certification of Local 144 as the bargaining representative of its maintenance employees, and contends that its refusal to bargain with Local 144 in order to test the validity of such certification is not a dispute subject to arbitration under section 716 of the Labor Law. Petitioner seeks also to stay the arbitration directed by the respondent Industrial Commissioner. Special Term denied petitioner's application for a stay of arbitration and further ordered and adjudged that petitioner's refusal to negotiate was "impermissible under sections 705 and 707 of the Labor Law". It is such adjudication which is stricken from the order and judgment. This court has not so held nor does the statute so declare.

With respect to the denial of the application pursuant to CPLR Article 75 to stay arbitration, such determination is approved for the petition is insufficient on its face to entitle petitioner to any such relief. Under Labor Law, section 716, it is not requisite that there exist a valid agreement to arbitrate before any existing dispute between the parties can be referred to arbitration. In fact subdivision 4 thereof provides in the absence of a collective bargaining agreement between the employees of a non-profitmaking hospital, or their representatives, and such hospital, the New York State Board of Mediation and the Industrial Commissioner may exercise certain powers vested in them under subdivision three of section 716. Subdivision 3(b) empowers the Industrial Commissioner to submit the dispute to arbitration upon his own motion upon certification by the Board of Mediation that in its opinion efforts to effect a voluntary settlement of such dispute have been unsuccessful. In short, compulsory arbitration may be imposed upon the parties where disputes are found to exist. The relevant provisions of CPLR Article 75 with respect to stay of arbitration have no application under such con-

ditions and the absence of a valid agreement to arbitrate is neither fatal nor a deficiency. (See also, Labor Law §716(6) re: jurisdiction of the supreme court.) The area of disputes to be resolved is defined in section 716(1) and we cannot now conclude that matters will be determined which are not embraced in the applicable provision.

Special Term (Flynn, J.) earlier determined that petitioner's refusal to negotiate with the union was a dispute within the meaning of Labor Law, §716, and such determination was unanimously affirmed on appeal (28 A D 2d 1092).

In that phase of the proceeding pursuant to CPLR Article 78 which seeks to review and annul the Industrial Commissioner's determination that the dispute is subject to compulsory arbitration, and to enjoin the other respondents from taking further action in pursuance thereof, we conclude also that the allegations of the petition are insufficient to entitle petitioner to the relief sought.

Section 716, subdivision 6, of the Labor Law spells out the powers of the supreme court with respect to matters embraced within that section. In so doing it, in effect, limits such powers, particularly with respect to the time or stage of the proceeding at which such powers shall be exercised. In a prior appeal involving these parties (26 A D 2d 543) this court noted "the only avenue to judicial review as to certification is limited to a direct appeal from a final order *arising in enforcement proceedings* (Labor Law §707)" (emphasis supplied) (P. 543-544; *cf.* Matter of Wallach's Inc. *v.* Boland, 253 App. Div. 371, aff'd 277 N. Y. 345). It does not now appear that the matters directed to be submitted to arbitration are beyond the scope of section 716, nor can we now conclude that matters without the jurisdiction of the arbitrator will be entertained and resolved by it.

Order filed.

Appendix A

Opinion of Supreme Court, New York County

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I

[SAME TITLE]

DAVIDSON, J. *Memo.*

This is an application by petitioner, a non-profit hospital, to stay compulsory arbitration between petitioner and Local 144, ordered by the respondent Industrial Commissioner. The petitioner seeks to restrain the New York State Board of Mediation, which has been designated by the Industrial Commissioner as Arbitrator, from proceeding to arbitrate the dispute between the hospital and the Union. Petitioner has refused to recognize and bargain collectively with Local 144.

Petitioner contends 1. that it has a right to judicial review of Local 144's certification as the bargaining representative; and 2. that Labor Law, Sec. 117, is an unconstitutional delegation of legislative power to the Industrial Commissioner and the New York State Mediation Board.

On December 28, 1964 the New York State Labor Board certified Local 144 as bargaining representative of petitioner's maintenance employees (Labor Law, Sec. 705). A certification by the Labor Board as to the proper bargaining representative under Labor Law Sec. 705 may not be judicially reviewed (*Matter of Wallach's Inc.* v. *Boland*, 253 App. Div. 371; aff'd. 277 N. Y. 345).

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The Appellate Division of the First Department on an appeal involving the same parties in this proceeding ruled "the only avenue of judicial review as to certification is limited to a direct appeal from a final order arising in an enforcement proceeding (Labor Law, Sec. 707)." 26 A. D. 2d 543. Clearly this court may not disregard that decision but is duty bound to implement it. Petitioner's refusal to acknowledge Local 144 and begin collective bargaining with the Union was an impermissible flouting of the Appellate Court's mandate. Petitioner's claim to stay arbitration on that ground is denied.

Petitioner's claim that Labor Law Section 716 is unconstitutional because it improperly delegates power to the State Board of Mediation and the Industrial Commissioner without providing legislative standards to guide them in the exercise of those powers appears equally without merit. The Legislature recognized that the business of the nonprofit hospital was so affected with the public interest as to require continued and uninterrupted service to the public. It was for that reason that this legislation was enacted which prohibited the hospital employees from striking and which provided for compulsory collective bargaining, fact-finding and arbitration. The delegation of power to an administrative agency may be accomplished in general language, but the specific evil which the statute seeks to eliminate is a guidepost to direct and channel administrative discretion. The statute and its amendments were designed to avoid labor disputes in voluntary hospitals by coupling the extension of collective bargaining right with a prohibition against strikes. It seems clear that the law was intended to guarantee to workers in charitable hospitals all the rights available to other workers covered by the State Labor Relations Act, except the right to

strike or to picket and to provide the substitution of mediation, fact finding and binding arbitration for strikes. It would seem that the Industrial Commissioner has the experience which would justify reliance upon his expertise in determining which remedy is most likely to effect the statutory purpose in each particular case. Such expertise may be exercised only in the manner in which the statute permits.

The discretion thus vested in the Industrial Commissioner is not an improper delegation of legislative authority.

The Hospital Association of New York State Incorporated, a New York Membership Corporation of over 250 non-profit voluntary hospitals in New York State, has petitioned the court for permission to appear in these proceedings as Amicus Curiae. Such permission to intervene is granted.

It follows, therefore, that Petitioner's application to stay arbitration is in all respects denied. Settle order.

/s/ IRWIN D. DAVIDSON
J. S. C.

Dated: September 5, 1967

Appendix B, Statutes Involved

New York Labor Law, §§713, 716

§713. Limitations

Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities, except that it shall continue to be unlawful for the employees of a non-profitmaking hospital or residential care center, or their representatives, or any other persons to engage in or to induce or encourage, or to attempt to engage in or to induce or encourage any strike, work stoppage, slowdown or withholding of goods or services by such employees or other persons at such hospital or residential care center, provided, however, that nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital or residential care center, as long as such publicity does not have the effect of inducing any persons to withhold goods or services at such hospital or residential care center.

It shall be unlawful for a non-profitmaking hospital or residential care center to institute, declare or cause, or to attempt to institute, declare or cause any lockout of the employees of such hospital or residential care center. Added L.1937, c. 443, §1; amended L.1963, c. 515, §3, eff. July 1, 1963.

§716. Grievances and disputes in non-profitmaking hospitals and residential care centers

1. As used in this section "grievance" means any controversy or claim arising out of or relating to the inter-

pretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section "dispute" means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including, but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions.

2. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of grievances shall be deemed to include provision for the submission of such grievances, upon the request of either or both parties, to arbitration pursuant to such rules as may be established from time to time by the New York state board of mediation.

3. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of disputes shall be deemed to include provisions for:

(a) the appointment of a fact-finding commission by the New York state board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such

board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendations for the settlement of the dispute, as are vested in a board of inquiry by article twenty-two of this chapter; and

(b) the submission of the dispute to arbitration, pursuant to such rules as may be established from time to time by the New York state board of mediation, by such board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board of mediation that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful.

4. In the absence of a collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center, the New York state board of mediation and the industrial commissioner may, in the manner and upon the conditions provided in subdivision three of this section, exercise all of the powers vested in them by the provisions of such subdivision of such section.

5. Nothing in this section shall be deemed to affect, impair or alter any collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which was executed prior to July first, nineteen hundred sixty-three, during the term of such contract.

Appendix B

6. The supreme court shall have jurisdiction, to confirm, modify, correct or vacate any arbitration award made pursuant to the procedure established by this section, in the manner provided by article eighty-four of the civil practice act. The supreme court shall have jurisdiction, upon such notice as it deems appropriate, to restrain or enjoin any violation of the provisions of this section or section seven hundred thirteen and to grant such other and further equitable relief as may be appropriate. The provisions of section eight hundred seventy-six-a of the civil practice act shall not apply to an action or proceeding instituted pursuant to this section or section seven hundred thirteen. Added L.1963, c. 515, §5, eff. July 1, 1963.